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# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

JACOB FROHWERK, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA.

No. 685.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF MISSOURI.*

## STATEMENT.

Jacob Frohwerk, hereinafter called the defendant, was indicted, together with Carl Gleeser, for violating sections 3 and 4, Title I of the Espionage Act (act of June 15, 1917, c. 30, 40 Stat. 217). The text of these sections is appended in the margin hereof.<sup>1</sup>

There were thirteen counts in the indictment.

<sup>1</sup> SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.

SEC. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided, conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

The first count (R. 3) stated that while the United States was at war with the Imperial German Government and on or about June 22, 1917, and from and after that date until December 14, 1917, the defendants were engaged in the preparation, publication, distribution, and circulation of a weekly newspaper in Kansas City, Missouri, entitled "Missouri Staats Zeitung," generally circulated throughout the city of Kansas City, the State of Missouri, and other parts of the United States; that on the 22d day of June, 1917, they did wilfully and feloniously conspire together and with divers other persons to the grand jury unknown, to violate section 3 of Title I of the Espionage Act by wilfully causing and attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States and by obstructing the recruiting and enlistment service of the United States.

The other twelve counts (R. 27-55) charged the defendant and Carl Gleeser with substantive acts of attempting to cause disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, in violation of section 3, Title I of the Act. All thirteen counts were based upon the conspiracy to publish and the publication of certain statements, articles, and alleged news items in thirteen separate issues of the "Missouri Staats Zeitung," the first of said issues being on July 6, 1917, and the last on December 7, 1917. All the statements and articles were set out at length in the first count, the designated statements, articles, and items of each of said

issues of the paper being set forth as a separate overt act. Each of the twelve counts for the substantive offence is then based on the statements, articles, and items of one of such issues, the texts of which are again set forth in full in the indictment.

The main tenor of the whole series of articles is that Germany committed no wrong against the United States; that this country entered into the war for the benefit of England and the rich men; that the official reasons for our entrance into the war, such as the benefit of democracy and wrongs committed against us by Germany, are mere pretenses.

The first overt act in the conspiracy count (R. 4) and the second count (R. 27) set forth articles in the July 6, 1917 issue of the said paper. One is entitled "Come Let us Reason Together." It expresses horror at the thought of sending American boys to "the blood-soaked trenches of France" for the benefit of the trusts and England, who lets us fight her battles, and predicts the invincibility of Germany and warns against sending our troops to France. The second article is a letter to the editor, signed Joseph D. Shewalter, attacking the Selective Service Act as unconstitutional.

The second overt act in the conspiracy count (R. 7), and the basis of the third count of the indictment (R. 31), was an article in the July 20, 1917 number of the paper, accusing the Government of an imperialistic policy and calling the officially announced motives of the war, such as fighting for democracy and against German wrongs, mere pretenses.

The third overt act in the conspiracy count (R. 9) and the basis of the fourth count (R. 33) consisted of an article entitled "Lansing on War Issues", and several other discussions of the war in the August 3, 1917 issue of the paper. The first of these articles related to Secretary of State Lansing's Madison Barracks, New York, address, and attacked, as lacking in genuineness, Mr. Lansing's claim that Germany's unrestricted submarine warfare was the immediate occasion of the war. It alleged that Germany had done no wrong to this country, and pictured the war as having been instigated by the big financial interests for their benefit. Similarly it pictured the European war as having been instigated by the money powers of Great Britain and our entrance into it due to the fact that Great Britain was losing the war and the American financial interests pushed this country to the rescue. The following passages are noteworthy (R. 10-11):

Almost with the firing of the first gun in the European war we have outraged every sense of morality, decency and violated every provision of international law by furnishing bombs, shot and powder to one of the belligerents.

This action of our administration is the direct cause of this war, but Mr. Lansing dares not tell the truth to the American people. Why does Mr. Lansing ask this question?

Let me then ask you, would it be easier or wiser for this country, single-handed, to resist a German empire, flushed with victory

and with great armies and navies at its command, than to unite with the brave enemies of that empire in ending now and for all time this menace to our future?

Germany has existed some two thousand years before and has been flushed with victory in many a war. Now we ask Mr. Lansing, did Germany in all the time of our national existence ever exhibit the slightest designs upon us or for that matter upon any other country? On the contrary, has not Germany been our only consistent friend of all the other belligerents?

(R. 11):

When Mr. Wilson, upon the request of our big financial interests, but against his better and often expressed knowledge of neutrality laws, consented that these laws be deliberately violated, he believed what he was told—that Germany would speedily be crushed. This expectation has not been realized. The principle of law invoked by us in the Civil War against Great Britain for breach of neutrality would have served as precedent to bring us before the bars of justice at the close of the war and would have made us as liable for damages inflicted as it did England then.

Patriotic American citizens pleaded in vain with the administration and with Mr. Wilson personally against this breach. The *Staats-Zeitung* was one of the most ardent and persistent to point out this great wrong and the consequent danger such a policy must eventually bring to our nation. For our efforts in

behalf of the honor and the security of our Republic we were called traitors by Mr. Wilson.

That a few men and corporations might amass unprecedented fortunes, we sold our honor, our very soul. We sowed to the winds and are reaping now the whirlwind. This, Mr. Lansing knows, is the true state of affairs; that is the reason we are at war now. \* \* \*

We have gone to war to cover up this awful blunder of our administration and to protect the loans of Wall street to the allies with the blood of our American boys and the sacrifices and sufferings of the American people.

(R. 12):

English money power has lost its war against Germany.

Having no grievances of our own to fight for, the question now squarely before the American people is, how far we are willing to sink our fortunes and spend the best blood of the nation to hold off the complete collapse of English money power.

We do not fail to give full recognition of the tremendous power wielded in this war by our own financial interests through a corrupt press and other channels, and which to all purposes and intents is now allied with that of England. Neither do we fail to realize that notwithstanding all our boasts of democracy, our public officials are in the last analysis but pawns of this tremendous, invisible power of Wall street.



The fourth overt act in the conspiracy count (R. 13) and the basis of the fifth count (R. 37) were several articles and news items in the August 10, 1917 issue of the paper. It pictured the anguish of men drafted to protect rich men's money. Another item in this issue played upon the theme of the enormous costs of the war. Another item alleged that Germany had done no wrong to this country and pictured England as our chief foe and commercial rival.

The next overt act in the conspiracy count (R. 18) and the basis of the sixth count of the indictment were articles in the August 17, 1917 issue of the paper, again picturing the war as one for the benefit of the money power.

The next overt act in the conspiracy count (R. 16) and the seventh count of the indictment (R. 41) was an article in the August 24, 1917 issue, containing the resolutions of a G. A. R. post, Lincoln, Mo., attacking the conscription law. This seventh count was the one upon which the jury returned a verdict of not guilty.

The next item in the conspiracy count (R. 17) and the basis of the eighth count of the indictment (R. 43) were articles and items in the August 31, 1917 issue of the paper. They pictured this country as the tool and victim of English greed. A few passages will illustrate (R. 18):

The sooner the public wakes up to the fact that we are led and ruled by England the better.

Then and only then will they understand why our sons are to be slaughtered in France and why we have thrown the Monroe Doctrine into the scrap pile and embarked upon a world's policy.

A world's policy, not for our benefit, but to help England in holding and in extending her world dominion.

Then and only then—when this situation is one thoroughly comprehended by the American people, when they once realize that their sons, their taxes, and their sacrifices are only in the interest of England—will a return to a really sovereign and independent America be possible.

The next overt act of the conspiracy count (R. 18) and the basis of the ninth count of the indictment (R. 44) were items in the September 21, 1917 issue of the paper, playing upon the theme of the terrible price this country was paying for an unworthy cause.

The next overt act in the conspiracy count (R. 19) and the basis of the tenth count in the indictment (R. 45) was an article in the September 28, 1917 issue of the paper treating France's desire for Alsace-Lorraine and England's desire for Germany's colonies as another example of foreign booty for which this country was being militarized.

The next overt act in the conspiracy count (R. 20) and the basis for the eleventh count of the indictment (R. 46) was a long article in the October 5, 1917 issue of the paper entitled "The Truth in a Nutshell," by Joseph D. Shewalter. It pictured Germany as

fighting a war of self-defense and the European war as due to England's commercial greed, and accounted for our entrance into the war in the following passage (R. 22, 23):

Well, how did the United States get into it?

These great trusts had controlled one political party completely, and it sought and captured the other completely in 1912. \* \* \*

And finally these great interests demanded war for three reasons:

First. The allies were exhausted financially and were unable to buy and pay for more munition.

Second. They were uneasy about the debts owed them, and wished the United States to advance the money to these foreign nations to pay for the munition they had already bought.

Third. They wished an enormous debt created, which would be owed to them and grind the people down for hundreds of years. They wanted a greater creditor class to own and collect the substance of the toilers.

The next item of the conspiracy count (R. 23) and the basis of the twelfth count of the indictment (R. 49) were items in the November 30, 1917 issue of the paper pointing out the changed war situation, due to the defection of Russia.

The last overt act of the conspiracy count (R. 23) and the basis of the thirteenth count of the indictment (R. 50) consist of items and articles in the December 7, 1917 issue of the paper. One article attacks the then recent statement of President Wilson

as to the alleged wrongs against which we were fighting, and ends with the paragraph (R. 24):

But what does all of this concern us as Americans? Let them have their feuds, fights, and wars over there for all any American should care about. What we are concerned in is the question, When will our grievances with Germany be considered righted and when can the American people expect peace? To this question Mr. Wilson has given no answer in his message, but instead has urged that the war be extended to Austria-Hungary, for no other reason than that it is an ally of Germany. We therefore repeat, his message may bring cheer to England, France, and Italy. It brings none to the American people.

In the same issue is the publication of a letter from one William Bross Lloyd to one Clarence Darrow opposing the war as of no benefit to the working classes. Then followed various war reports consisting of items favorable to the German cause and military situation.

Each of said overt acts in the conspiracy count is alleged to be the preparation, printing, publication, distribution, and circulation of said articles and items; and each of the other twelve counts alleges, as the means used in the attempt to cause disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, the preparation, printing, publication, distribution, and circulation of the articles and items in the particular designated issue of the said newspaper.

The defendant's demurrer to the indictment (R. 56) and his motion to dismiss (R. 59) were both overruled (R. 58). At the conclusion of the Government's evidence the defendant demurred to the evidence, which demurrer was overruled by the court (R. 63). The jury found the defendant not guilty on the seventh count and guilty on the other twelve. It does not appear from this record, but it is a fact that Gleeser, who was jointly indicted with the defendant, pleaded guilty. The defendant's time to file a bill of exceptions was extended (R. 75), the bill prepared and approved by the trial judge was rejected by the defendant (R. 77) and there is no bill of exceptions. The case is here on writ of error.

Many of the numerous assignments of error are not available here by reason of the absence of a bill of exceptions. For the same reason the overruling of the demurrer to the evidence is not reviewable here. The points made in the defendant's brief may be summarized and classified as follows:

1. That the indictment and each count thereof are insufficient and in violation of Article VI of the amendment to the Constitution, in that they do not inform the defendant of the nature and cause of the accusation against him;

2. That the Espionage Act, in so far as it be interpreted to warrant the indictment in this case, is in violation of the first amendment of the Constitution;

3. That the Espionage Act is in violation of section 3 of Article III of the Constitution; and

4. That the Espionage Act, in so far as it warrants the indictment in this case, is in violation of section 8 of Article I and the tenth amendment of the Constitution.

The Government will meet these four points in the same order, contending:

1. That the indictment is sufficient and in accord with the sixth amendment of the Constitution;

2. That the Espionage Act as interpreted in this case does not violate the first amendment of the Constitution;

3. That the Espionage Act does not violate section 3 of Article III of the Constitution; and

4. That the Espionage Act is an exercise of the Federal power to raise armies and declare war and, therefore, falls within Federal powers under section 8 of Article I and the tenth amendment of the Constitution.

## ARGUMENT.

### I.

#### **EACH COUNT OF THE INDICTMENT SUFFICIENT AND FULFILLS REQUIREMENTS OF THE SIXTH AMENDMENT.**

##### *(a). The conspiracy count.*

The conspiracy count sets forth the time of the formation of the conspiracy, namely, June 22, 1917, and the place, namely, Kansas City, Missouri. It alleges the object of the conspiracy, namely, to commit a violation of section 3, Title I, of the Espionage Act. It alleges the means or method of accomplishment of that object, namely, "by willfully

causing and attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, and by willfully obstructing the recruiting and enlistment service of the United States." It then sets forth the overt acts in detail. All the essential elements of a conspiracy are, therefore, alleged.

The means agreed upon to effect the conspiracy need not be set forth with greater particularity, as the conspiracy is the gist of the offense. See—

*U. S. v. Dennee*, Fed. Cas. No. 14948.

*U. S. v. Rindskopf*, Fed. Cas. No. 16165.

*U. S. v. Dustin*, Fed. Cas. No. 15011.

*U. S. v. Gordon*, 22 Fed. 250 (D. C.).

*Thomas v. People*, 113 Ill. 531.

To constitute a good indictment under section 5440 of the Revised Statutes, (now section 37 Federal Penal Code), it must charge that the conspiracy was to do some act made a crime by the laws of the United States, and must state with sufficient certainty the offense intended to be committed, and must then state some act done by one of the conspirators toward effecting the object of the conspiracy; all of which were contained in this indictment. See—

*U. S. v. Watson*, (D. C.) 17 Fed. 145.

*U. S. v. Adler*, 49 Fed. 736.

An indictment under the Revised Statutes, section 5440, is sufficient when it charges that the defendants "unlawfully did conspire to defraud the United States," followed by a statement of the nature and purpose of the conspiracy and the acts done to effect its object. *Wright v. U. S.*, 108 Fed. 805 (C. C.).

In *U. S. v. Benson*, 70 Fed. 591 (C. C.), the court, at pages 596 and 597, says:

An indictment under section 5440, which avers the conspiracy and then sets out the overt acts done to carry it into effect, is sufficient, and it is not necessary to aver the means agreed on to effect the conspiracy. *U. S. v. Dennee*, 3 Woods, 50, Fed. Cas. No. 14948; *U. S. v. Goldman*, 3 Woods, 192, Fed. Cas. No. 15225; *U. S. v. Dustin*, 2 Bond, 332, Fed. Cas. No. 15011; *U. S. v. Sanche*, 7 Fed. 715; *U. S. v. Gordon*, 22 Fed. 250; *U. S. v. Adler*, 49 Fed. 736. See, as to other offenses, *U. S. v. Utrici*, 3 Dill. 535, Fed. Cas. No. 16594; *U. S. v. Simmonds*, 96 U. S. 360; *U. S. v. Britton*, 107 U. S. 655, 661, 2 Sup. Ct. 512.

From the authorities we have cited and quoted from, it will be observed that the gist of the offense under the statute, as well as at common law, is the conspiracy. The cases quoted from and cited are principally decisions rendered in the respective circuits, and have no binding force upon this court, except such as may be found in the soundness of the reasons therein given. Our attention, however, has not been called to any decision of the Supreme Court which takes issue with the circuit courts as to the requirements of an indictment under the clause of section 5440 declaring it to be a conspiracy for two or more persons to conspire "to defraud the United States in any manner or for any purpose." On the other hand, there are decisions which substantially affirm the doctrines announced in the circuit courts. Some of them have already been cited in the course of this opinion.



In *Crawford v. United States*, 212 U. S. 183, 192, a conspiracy to defraud case, this court said, in passing on the sufficiency of the indictment:

\* \* \* It is not necessary in such a case as this (of an alleged unlawful and corrupt contract) to allege in the indictment which, of the various ways the Government might be defrauded, was in the minds of the conspirators, or that they all were. *Dealy v. United States*, 152 U. S. 539, 543.

(b) **The remaining counts.**

Each of the remaining twelve counts charges that the defendants, at the time and place specified, "attempted to cause disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, in this, that they did prepare, print, publish, distribute, and circulate in and by means of and as a part of a certain newspaper, known, designated, and entitled 'Missouri Staats-Zeitung,' and in the issue thereof bearing date (the date of the various articles being inserted here), the said newspaper being a newspaper generally circulated throughout the city of Kansas City, Missouri, and throughout the State of Missouri and throughout other parts of the United States, statements, reports, communications, articles, and alleged news items, being in words and figures as follows," followed by the texts of articles and items themselves.

These counts include all the necessary allegations of act and intent. The items and articles in the newspaper were such as to create in the reader

opposition to the war and to war service. According to a well-known principle of criminal law, there is a presumption that a person intends the natural and probable consequences of acts intentionally done.

*Agnew v. United States*, 165 U. S. 36.

*Reynolds v. United States*, 98 U. S. 145.

The charge that the defendants wilfully prepared, printed, published, and circulated these items and articles necessarily includes, by virtue of the said presumption, the intent against which the statute is directed; that is, the intent to cause disloyalty and refusal of duty in the military forces.

Furthermore the charge of "attempt" to cause refusal of duty, etc., necessarily imports and includes the charge of "intent" to cause that result.

*1 Bishop's New Criminal Law*, 8th Ed., sec. 728, states:

An attempt is an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act toward the doing, sufficient both in magnitude and in proximity to the fact intended, to be taken cognizance of by the law that does not concern itself with things trivial and small. Or, more briefly, an attempt is an intent to do a particular criminal thing, with an act toward it falling short of the thing intended.

In *Prince v. State*, 35 Ala. 367, 369, the court said:

Indeed, it seems impossible to doubt that the only distinction between an *intent* and an *attempt* to do a thing is that the former implies the

purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution.

The indictment therefore sets forth the time, the place, the act, and the intent, thus satisfying all the requirements of good criminal pleading. It clearly and fully charges offenses described in sections 3 and 4, Title I of the Espionage Act.

The defendant's statement on page 26 of his brief that the "indictment does not charge that the defendants made or conveyed false reports or false statements with intent to interfere with the operation or success of the military and naval forces of the United States or promote the success of its enemies," is irrelevant, as this prosecution was not based upon that portion of section 3 of the Espionage Act which relates to such false reports or statements. Nor is it true, as stated on page 24 of the defendant's brief, that "Section 3 does not prohibit the conveying of true reports or true statements but only those which are false." The clauses of section 3 upon which this prosecution was based make no provision whatever relative to the truth or falsity of any statements which may be used to cause insubordination in the military forces or to obstruct the recruiting and enlistment service.

## II.

**FIRST AMENDMENT OF THE CONSTITUTION NOT NECESSARILY INVOLVED IN THE CASE—RECORD DOES NOT DISCLOSE ANY VIOLATION THEREOF.**

The indictment charges conspiracy to cause or attempt to cause insubordination, disloyalty, and refusal of duty in the military forces of the United States and to obstruct the recruiting and enlistment service. The substantive counts allege an attempt to produce disloyalty, mutiny, and refusal of duty in the military forces. The evidence in the case is not before the court, and we may therefore assume that it supports the verdict and that the defendant did conspire to and did attempt to interfere by the means set forth in the indictment with the raising of an army and the faithful military service of those subject to military service.

The question raised under the First Amendment of the Constitution, therefore, comes down to this—whether Congress has a constitutional power to provide punishment for deliberate attempts by means of publication of articles in a newspaper to interfere with the raising of an army and the faithful military service of those subject thereto.

This whole subject has been so thoroughly discussed in the brief in the case of *Eugene V. Debs v. United States* No. 714 of this court, set for hearing on the same date as the instant case, that a short mention of the conclusions therein set forth will suffice here; and the court is respectfully referred to the Debs brief for the more detailed discussion.

The constitutional guaranty of free press and speech does not secure an absolute right, without subsequent responsibility, to speak, write, or print whatever one may please.

*2 Story Constitution of the United States.*  
5th ed., 634.

*Robertson v. Baldwin.* 165 U. S. 275, 281.  
*Toledo Newspaper Co. v. United States.* 247  
U. S. 402, 419.

According to the prevailing view, this constitutional freedom of the press applies to restraints previous to publication and not to responsibility after publication.

*4 Blackstone Commentaries*, 151.  
*Patterson v. Colorado*, 205 U. S. 454.

In the broadest interpretation of the constitutional immunity, it does not include that which is generally recognized as harmful, such as obscene, libelous, or seditious matter or that which was deemed harmful according to common law standards.

*Cooley's Constitutional Limitations*, 6th ed.,  
441.

*Warren v. United States*, 106 C. C. A. 156.

*Ex Parte Jackson*, 96 U. S. 727.

*People v. Most*, 171 N. Y. 423.

It does not include the right to interfere with military operations.

*Roscoe Pound*, Article on "Equitable Relief  
Against Defamation," *Harvard Law Re-*  
*view*, April, 1916. p. 640.

*Ex Parte Vallandigham*, 1 Wall. 243.

It does not include the right to intentionally attempt to induce others to violate law, whether such attempts be couched in direct or indirect language.

*Masses Publishing Co. v. Patten*, 246 Fed. 24.

The defendant was charged in effect with conspiring and attempting to induce others to violate the laws relating to military service. The jury found him guilty. The right of the community to punish intentional incitement to violation of law is too well recognized to warrant further discussion. Recognition of this power is implicit in *Ruthenberg v. United States*, 245 U. S. 480.

### III.

#### SECTION 3, TITLE I, OF THE ESPIONAGE ACT DOES NOT OFFEND AGAINST ARTICLE III, SECTION 3, OF THE CONSTITUTION RELATING TO TREASON.

By virtue of Article I, section 8, of the Constitution, Congress has the power to declare war and to raise armies. This necessarily includes the power to legislate against obstruction of or interference with the process of raising armies. As held in *McCulloch v. Maryland*, 4 Wheat. 316, in the exercise of any power granted to it, Congress must be allowed to select the means and methods which it deems appropriate and which are not forbidden by the Constitution.

Article III, section 3, of the Constitution provides:

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Obstruction of the process of raising the army may or may not arise from adherence to the enemy, and may or may not take a form falling within the constitutional definition of the crime of treason. We fail to see, however, why this fact that an obstruction of the process of raising an army in a great and vital war may arise out of a treasonable intent or take the form of treason either deprives Congress of the power to legislate against other forms of obstruction of the process of raising the Army, or limits the powers of Congress conferred by the provision of the Constitution relating to the raising and supporting of armies.

The defendants have not been accused of levying war against the United States nor of adhering to its enemies and giving them aid and comfort. If the provisions of the treason section of the Constitution were to be construed as depriving Congress of the power to protect the raising and supporting of armies against wilful obstruction thereof, in cases where the crime of treason as defined in the Constitution may not have been committed, then this power to raise and equip armies and, consequently, the power of national self-defense might be rendered nugatory.

War laws enacted by Congress, such as the control of exports, food regulations, war revenue and others, have the same purpose, namely, that of raising and supporting armies, and find their source in the same constitutional power, namely, to make war and raise and support armies,

as the Espionage Act. Violations of said laws often, in fact generally, arise from commercial, rather than treasonable motives. According to the defendant's contention, Congress would have no power to punish these serious and perhaps vital obstructions of the prosecution of a war. The Constitution has defined treason, but has left to Congress the definition of other offenses which may interfere with the conduct of a war.

Furthermore, even were the constitutional requirement of two witnesses to the overt act applicable to defendant's offense, the record does not disclose that he has been deprived of that protection. The number of witnesses who testified to the publication of the articles and items in the Missouri Staats-Zeitung does not appear.

#### IV.

#### **ESPIONAGE ACT EXERCISE OF WAR POWERS UNDER SECTION 8, ARTICLE I; TENTH AMENDMENT OF CONSTITUTION NOT INVOLVED.**

Section 3, Title I, of the Espionage Act is, as we have seen, an exercise of the Federal power to make war and raise armies. Congress is not engaged in regulating the press or exercising general police powers, though, as in the case of many other Federal crimes such as conspiracies to defraud, use of the mails for obscene matter and others, the publication of newspaper articles may be the instrumentality used for the commission of the Federal crime. This represents no invasion of the field of legislation reserved to the States. The Federal power to make



war and raise armies is complete and supreme in its field. The National Government is not required to look to the States for the means of exercising and enforcing this vital national power. As stated in *McCulloch v. Maryland*, 4 Wheat. 316, 424:

\* \* \* No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it can not control, which another Government may furnish or withhold, would render its course precarious; the result of its measures uncertain, and create a dependence on other Governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution.

#### CONCLUSION.

The judgment below should be affirmed.

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